Khor Teng Tong Holdings Sdn Bhd & Anor v Tan Boon Suan & Ors

COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL NO P-02–256 OF 2011
LOW HOP BING, ABU SAMAH AND LINTON ALBERT JJCA
29 JUNE 2012

Civil Procedure — Pleadings — Plea of confession and avoidance — Whether defendants discharged burden of proving plea

The respondents were directors and shareholders of a company which became a wholly-owned subsidiary of a company ('HCB') founded by the second appellant. To replace their shareholdings in the subsidiary, the respondents were issued shares in HCB which undertook an exercise to be listed on the then Kuala Lumpur Stock Exchange. That exercise entailed the issuance of HCB rights issue shares to all the respondents in proportion to their respective shareholdings in HCB. The rights issue shares were priced at RM1 each while the initial public offering price was RM2.85, thus giving a capital gain of RM1.85 per share. It was the respondents' case that they agreed to go along with the second appellant's proposal that the respondents renounce their entitlement to the rights issue shares in favour of the first appellant — a substantial shareholder of HCB — so that the shares could be offered for sale to the public and certain government-approved institutions and that from the total capital gain thus acquired the second appellant would deduct the expenses for the listing exercise and pay the respondents their respective net capital gain within three months. The respondents never received the promised monies and they filed action in the High Court to recover their debts. The appellants contended that the cash cheques for payment of the respective amounts due to the respondents were in fact issued and were received and encashed by the respondents. The High Court granted the respondents judgment for the amounts claimed holding the appellants' defence to be a sham, full of contradictions and inconsistent with their pleadings. The appellants appealed the decision to the Court of Appeal.

Held, dismissing the appeal with costs and affirming the decision of the High Court:

(1) The court agreed with the trial judge that the renunciation by the respondents of the rights issue shares in favour of the first appellant was for monetary consideration and that the respondents had not received their respective payments from the appellants. That finding of fact was adequately supported by the evidence adduced at the trial (see para 18).

(2) The court also agreed with the trial judge's finding that the appellants had failed to discharge the burden of proving the defence of confession and avoidance (see para 19).

[Bahasa Malaysia summary

Responden-responden adalah pengarah-pengarah dan pemegang-pemegang saham syarikat yang menjadi anak syarikat milik penuh syarikat ('HCB') yang diasaskan oleh perayu kedua. Untuk menggantikan pemegangan saham mereka di dalam anak syarikat, responden-responden diberikan saham-saham di dalam HCB yang mana menjalankan pelaksanaan untuk disenaraikan di Bursa Saham Kuala Lumpur pada masa itu. Pelaksanaan tersebut melibatkan penerbitan saham terbitan hak HCB kepada kesemua responden dalam perkadaran bahagian pemegangan saham HCB mereka masing-masing. Saham-saham terbitan hak diberi nilai RM1 setiap satu sementara harga tawaran permulaan awam adalah RM2.85, dengan itu memberikan keuntungan modal sebanyak RM1.85 setiap saham. Adalah kes responden bahawa mereka bersetuju untuk mengikut cadangan perayu kedua bahawa responden-responden melepaskan hak mereka terhadap saham-saham terbitan hak untuk memihak perayu pertama — pemegang saham substansial HCB — oleh itu saham-saham boleh ditawarkan untuk jualan kepada orang awam dan institusi-institusi tertentu yang diluluskan kerajaan dan bahawa daripada keuntungan modal yang diperolehi perayu kedua akan menolak perbelanjaan untuk pelaksanaan penyenaraian tersebut dan membayar kepada responden-responden keuntungan modal bersih masing-masing dalam masa tiga bulan. Responden-responden tidak pernah menerima wang yang dijanjikan dan mereka memfailkan tindakan di Mahkamah Tinggi untuk mendapatkan balik hutang mereka. Perayu-perayu berhujah bahawa cek tunai untuk bayaran jumlah masing-masing yang kena dibayar kepada responden-responden sebenarkan telah dikeluarkan dan diterima dan telah ditunaikan oleh responden-responden. Mahkamah Tinggi memberikan responden-responden penghakiman untuk jumlah yang dituntut dengan memutuskan pembelaan perayu-perayu adalah penipuan, penuh dengan percanggahan dan tidak konsisten dengan pliding mereka. Perayu-perayu merayu keputusan tersebut kepada Mahkamah Rayuan.

Diputuskan, menolak rayuan dengan kos dan mengesahkan keputusan Mahkamah Tinggi:

(1) Mahkamah Tinggi bersetuju dengan hakim perbicaraan bahawa pelepasan saham-saham terbitan hak oleh responden-responden dengan memihak perayu pertama adalah untuk pertimbangan wang dan bahawa responden-responden tidak menerima bayaran masing-masing daripada perayu-perayu. Dapatan fakta tersebut adalah disokong secukupnya dengan keterangan yang dikemukakan pada masa perbicaraan (lihat perenggan 18).

(2) Mahkamah juga bersetuju dengan dapatan hakim perbicaraan bahawa perayu-perayu gagal untuk melepaskan beban membuktikan pembelaan pengakuan dan pengelakan (lihat perenggan 19).]

Notes

For a case on plea of confession and avoidance, see 2(3) *Mallal's Digest* (4th Ed, 2012 Reissue) para 6558.

Cases referred to

Kulandi Muthu v Subramaniam Velliappan [1983] CLJ (Rep) 603, HC (refd)

Appeal from: Civil Suit No 22–789 of 1998 (High Court, Pulau Pinang)

Ghazi bin Ishak (K Kirubakaran, Mureli Navaratnam and Ong Yu Shin with him) (Mureli Navaratnam) for the appellant.

Edward Louis Van Buerle (Ung Chirt Kye and Tan Swee Cheng with him) (Phee Chen & Ung) for the respondent.

Low Hop Bing JCA (delivering judgment of the court):

APPEAL

[1] This is the appellants' (the first and second defendants') appeal against the following orders made by the Penang High Court:

(a) that the first and second defendants (collectively, the defendants) do jointly and severally pay:

The Plaintiff	Amount
First Tan Boon Suan	RM1,749,117.77;
Second Tan Cheng Hin	RM769,611.82;
Third Tan Boo Nam	RM1,749,117.77;
Fourth Ng Cheng Lai	RM489,752.98
Fifth Teoh Kim Kooi	RM419,788.26
Sixth Tan Thean Chooi	RM244,876.49 and
Seventh Ong Kok Leong	RM524,735.33

(b) interest at 8%pa from 7 November 1997 till the date of realisation; and

(c) costs of RM20,000 to each the plaintiff.

[2] We now give our grounds for dismissing the appeal.

FINDING OF FACTS

[3] Although the evidence adduced at the trial appears to be somewhat convoluted, the daunting process of distilling the relevant facts from the irrelevant must still be resolved.

[4] So far as relevant to this appeal, the evidence adduced for the plaintiffs revealed that the plaintiffs were the promoters, shareholders and directors of Sin Wan Fatt Marine Products Sdn Bhd ('SWF') which was a profitable company and having a very good financial track record. It was primarily involved in the processing and packaging of marine products. SWF had an accumulated post-tax profit of about RM9,000,000 as at the end of 1996, which was the highest as compared to the previous four years.

[5] Sometime in 1994, the second defendant Dato' Khor Teng Tong through his nephew Khor Chai Tian ('SP13') approached the first plaintiff to merge their family-controlled companies viz SWF and Master-Pack (PG) Sdn Bhd ('Master-Pack') for the purpose of listing on the second board of the (then) Kuala Lumpur Stock Exchange. SWF was the anchor company for the listing exercise.

[6] The second defendant later proposed the addition of his associated company, Masuka Bina Sdn Bhd ('Masuka'), to participate in the merger and listing exercise. That proposal was accepted by the shareholders of SWF and Master-Pack. On 17 June 1994, these three companies became the wholly owned subsidiaries of Hunza Consolidation Bhd ('HCB') which was converted to a public company on 30 May 1996 and listed on 6 November 1997. The second defendant was the founder and director of HCB. The shareholders of the three subsidiaries were to be issued HCB shares as replacement for their respective shareholdings in the subsidiaries. A share swap exercise led to the plaintiffs owning the following shares in HCB:

The Plaintiff	Shares in HCB
First Tan Boon Suan	750,000
Second Tan Cheng Hin	330,000
Third Tan Boo Nam	750,000
Fourth Ng Cheng Lai	210,000
Fifth Teoh Kim Kool	180,000
Sixth Tan Thean Chooi	195,000
Seventh Ong Kok Leong	225,000

Total	= 2,640,000
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[7] The listing exercise also entailed the issuance of HCB rights issue shares to, inter alia, all the plaintiffs in proportion to their respective shareholdings in HCB. The rights issue shares were priced at RM1 while the initial public offering ('IPO') price was RM2.85. The plaintiffs could subscribe for the rights issue shares at RM1 per share and then sell it for RM2.85 upon listing, thus making a capital gain of RM1.85 per share. That being the case, it would be in the interest of the plaintiffs to subscribe for the rights issue shares in relation to their respective entitlement in order to make the following capital gain:

The Plaintiff	Entitlement to Rights Issue Shares	Capital Gain @ RM1.85 per share
First Tan Boon Suan	955,020.	RM1,766,787.
Second Tan Cheng Hin	420,028.	RM777,384.80.
Third Tan Boo Nam	955,020.	RM1,766,787.
Fourth Ng Cheng Lai	267,405.	RM494,699.25.
Fifth Teoh Kim Kool	229,205.	RM424,029.25.
Sixth Tan Thean Chooi	133,703.	RM247,350.55.
Seventh Ong Kok Leong	286,506.	RM530,036.10.

Total	=	RM6,007,073.95
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[8] However, in the course of negotiations for the merger, and based on the representations of the second defendant and his nephew Khor Chai Tian ('SP13'), the plaintiffs through the first plaintiff agreed to renounce their respective entitlement to the rights issue shares in favour of the first defendant, Koh Teng Tong Holdings Sdn Bhd, a substantial shareholder of HCB. The second defendant's representations, inter alia, were:

(a) the second defendant had been advised by his corporate advisors that as a condition of listing approval, the Securities Commission ('SC') would impose a condition requiring HCB to offer a portion of HCB's shares to members of the public and government-approved Bumiputra institutions. The second defendant and Khor Chai Tian (SP13) proposed to the plaintiffs that in the event of SC's approval of HCB's listing, all HCB shareholders should renounce their respective rights issue shares in favour of the first defendant so as to offer these shares to the public and approved institutions to comply with SC's condition;

(b) the second defendant told the first plaintiff that there were too many shareholders in HCB and in order to make it easier to place shares to the

public and approved institutions, the plaintiffs should renounce their rights issue shares in favour of the first defendant only; and

(c) the second defendant also represented to the first plaintiff that the capital gain due to the plaintiffs from their rights issue entitlement would be held by the second defendant in a common pool account maintained by the second defendant to defray any additional or unexpected expenses for the listing exercise; and that he would pay the plaintiffs the net monies due to each of them within three months from the date of issuance of allotment after deducting the said expenses.

[9] On 2 July 1997, HCB issued rights issue shares to the plaintiffs. As agreed between the plaintiffs and the defendants, the plaintiffs renounced their rights issue shares to the first defendant. The first defendant then sold a total of 12,272,000 rights issue shares to the public and approved institutions, thereby making a capital gain of RM22,703,320.

[10] On 7 November 1997, the first defendant issued seven Malayan Banking Bhd ('MBB') cash cheques to each of the plaintiffs, being payment of the net amount due respectively to each of the plaintiffs for the rights issue shares renounced in favour of the first defendant. Particulars of the payments and the plaintiffs' acknowledgment of receipt, as required by the defendants, are:

Cheque No	Voucher No Signed by the Plaintiff	Amount (RM)	Payee (the Plaintiff)
566702	PV.00.02	419,788.26	Teoh Kim Kooi (fifth)
566703	PV.00.03	244,876.49	Tan Thean Chooi (sixth)
566704	PV.00.04	489,752.98	Ng Cheng Lai (fourth)
566705	PV.00.05	524,735.33	Ong Kok Leong (seventh)
566707	PV.00.07	769,611.82	Tan Cheng Hin (second)
566708	PV.00.08	1,749,117.77	Tan Boo Nam (third)
566709	PV.00.09	1,749,117.77	Tan Boon Suan (first)

[11] The second defendant through his agents/servants retained and cashed the plaintiffs' cheques purportedly to pool the monies into a common account. However, after the agreed period of three months, the defendants failed to pay

the monies due to the plaintiffs. Hence, the plaintiffs sought and obtained the aforesaid judgment against the defendants for the respective sums due to them, with interest and costs.

[12] On the other hand, the defendants relied on the defence of confession and avoidance. The evidence adduced for the defendants was to the effect that:

(a) there was no contract or agreement for the plaintiffs to renounce the rights issue shares, sell the rights issue shares, pool the proceeds of sale together, make deduction for listing expenses and then return the net monies to the plaintiffs. Instead, the plaintiffs had to renounce their rights issue shares in favour of the first defendant, while the second defendant would be solely liable for HCB's profit guarantee dated 9 September 1997 executed by the substantial shareholders of HCB in favour of SC as required by SC;

(b) the plaintiffs had signed a private agreement (which was undated and unstamped) whereby they agreed to indemnify HCB's substantial shareholders who had executed the profit guarantee with joint and several liabilities. These substantial shareholders of HCB are Tan Boon Suan (the first plaintiff), Tan Boo Nam (the third plaintiff), Wiration Management Sdn Bhd and Khor Teng Tong Holdings Sdn Bhd (the first defendant). Despite the joint and several liabilities, they have agreed inter se to apportion their respective liabilities under the profit guarantee as follows:

HCB Substantial Shareholders	Appointment of Liability Under Profit Guarantee
Tan Boon Suan	15%
Tan Boo Nam	15%
Wiration Management Sdn Bhd	20%
Khor Teng Tong Holdings Sdn Bhd	50%

(c) the defendants had given the cash cheques to each of the plaintiffs for their respective share entitlement pursuant to the first plaintiff's demand as the plaintiffs needed the monies to ensure that SWF reached its projected profit targets for the ensuing years. The cash cheques were taken by the first plaintiff for all the plaintiffs and the first plaintiff had signed and obtained the plaintiffs' acknowledgment of receipt vide the payment vouchers for the cash cheques respectively;

(d) under recital C(i) of the profit guarantee, the substantial shareholders had jointly and severally guaranteed the profit forecast of HCB for the financial years ending 1997, 1998 and 1999. HCB achieved its profit forecast for 1997–1998, but not for the financial year ending 1999, as a result of which, the four substantial shareholders as guarantors had to top up the shortfall as follows:

Substantial Shareholders	Top-up Amount
Tan Boon Suan	: RM739,921.65 (15%)
Tan Boo Nam	: RM739,921.65 (15%)
Wiration Management Sdn Bhd	: RM986,562.20 (20%)
Khor Teng Tong Holdings Sdn Bhd	: RM2,466,445.50 (50%)

(e) the substantial shareholders did not make any demand on other HCB shareholders for indemnity of the profit shortfall under the purported private agreement.

CONFLICTING VERSIONS

[13] It is to be noted that the plaintiffs and the defendants have given conflicting versions as to why the plaintiffs had agreed to the renunciation of the rights issue shares. The learned trial judge found the plaintiffs' version to be more probable, and held that the defence was a sham, full of contradictions and was inconsistent with the defendants' pleadings. The private agreement relied on by the defendants was rejected at the trial as it was not pleaded in the amended defence. That being the case, the defence was rejected by the learned trial judge.

QUESTION FOR DETERMINATION

[14] The question for determination in the instant appeal may be formulated as follows:

> Given the factual background as detailed above and having considered the defendants' amended defence in general and the plea of confession and avoidance in particular, was the learned trial judge correct in holding the defendants liable and in giving the aforesaid judgment for the plaintiffs?

[15] This is a question of mixed fact and law. The finding of facts by the learned trial judge is crucial. He is entitled to accept the plaintiff's version as being more probable. As the purported private agreement on which the defendants relied was neither dated nor stamped, and was not pleaded in the defendants' amended defence, it was rightly rejected by the learned trial judge.

[16] We would next consider the defendants' defence of confession and avoidance. This defence is to be tested by reference to its meaning and the applicable burden of proof set out at pp 133–134 of *Jacob and Goldrein's Pleadings Principles and Practice*. We gratefully reproduce the following passages:

A Confession and Avoidance Meaning

The term 'confession and avoidance' is the description of a plea in the defence which, while expressly or impliedly admitting or confessing or assuming the truth of the material facts alleged in the statement of claim, seeks at the same time to avoid or destroy the legal consequences of those facts. The plea is invoked by alleging fresh B or additional facts to establish some legal justification or excuse, or some other ground for avoiding or escaping legal liability. The defendant, as it were, 'confesses' the truth of what is alleged against him but proceed immediately to 'avoid' the effect of such allegations.

C Material facts and burden of proof

The defendant must plead all the material facts relied on as constituting the 'avoidance' of what he otherwise confesses or admits to. The burden of proof is upon him to prove those facts.

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[17] Within our shores, this defence has been applied in *Kulandi Muthu v Subramaniam Velliappan* [1983] CLJ (Rep) 603 (HC), where Mohd Azmi FJ (as he then was) explained that where a party pleads the defence of confession E and avoidance, that party bears the burden of proving the material facts constituting the confession and avoidance.

[18] Reverting to the mainstream of this appeal, the defendants had F confessed or admitted to issuing the seven cheques but sought to avoid payments therefor on the facts unfolded above, especially the defence that the proceeds from the cheques had been duly acknowledged and encashed by the plaintiffs. Having reviewed the entire evidence adduced at the trial, we agree with the position taken by the learned trial judge that the renunciation by the G plaintiffs of the rights issue shares to the first defendant was for monetary consideration and that the plaintiffs have not received their respective payments from the defendants. That finding of fact is adequately supported by the evidence adduced at the trial.

H **[19]** We also agree with the learned trial judge's finding that the defendants have failed to discharge the burden of proving the defence of confession and avoidance.

I CONCLUSION

[20] On the foregoing grounds, we found no merit in this appeal which we dismissed with costs of RM50,000, and affirmed the decision of the High Court.

[21] Deposit to the plaintiffs (the respondents) on account of the fixed costs.

Appeal dismissed with costs and decision of the High Court affirmed.

Reported by Ashok Kumar